



Date: July 15, 1998  
Case No.: 97-INA-312

*In the Matter of:*

**ENCORE FORWARDING, INC.**  
Employer,

*On Behalf of:*

**ELZBIETA KARDOS-LASZLONE**  
Alien.

APPEARANCE: Dr. Nikolaj-Klaus von Kreitor  
For Employer and Alien

BEFORE: Burke, Guill and Vittone,  
Administrative Law Judges

### **DECISION AND ORDER**

*Per Curiam.* This matter arises from Employer's request for review by the Board of Alien Labor Certification Appeals of a denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO").<sup>1</sup> Employer is a freight forwarding company seeking to fill the position of "freight traffic consultant." (AF 4).<sup>2</sup>

### **STATEMENT OF THE CASE**

In a Notice of Findings ("NOF") dated June 10, 1996, the Certifying Officer ("CO") proposed to deny the application for labor certification on the grounds that Employer had imposed an unduly restrictive foreign language requirement of fluency in Polish and Hungarian and had created an unduly restrictive experience requirement of nine years in the position advertised. (AF 32-35). The CO found that Employer had not adequately documented a business necessity for its foreign language requirement. (AF 34). The CO requested that Employer

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<sup>1</sup>Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the implementing regulations at 20 C.F.R. Part 656. Unless otherwise noted, all references to regulations will be to Title 20 of the Code of Federal Regulations.

<sup>2</sup>References to the appeal file are abbreviated "AF".

provide her with documentation to prove the business necessity. (AF 34). Such documentation was to include the number and percentage of Employer's clients who could not speak English, especially considering that most freight forwarding took place only between ports and airports and did not include inland delivery that would require fluency; the percentage of business that was dependent on foreign-language-only customers, what adverse impact there would be of not having someone who could speak both Polish and Hungarian and why those duties could not be spread throughout the company; the percentage of time the person would have to speak the foreign language; and how Employer had dealt with Polish and Hungarian customers in the past. (AF 33-34).

The CO also found that Employer had included a nine year experience requirement that, although fitting within the DOT specifications, was near the high end and appeared to be tailored to Alien's qualifications. (AF 33). The CO thus requested that Employer provide documentation showing a business necessity for this experience requirement. (AF 33). The CO suggested, as corrective action, that Employer define and document the nine year experience requirement in context with the position offered; document and identify projects requiring special skills to which the nine year experience requirement was addressed; document that it was normal in the industry to require that level of experience, and the name and number of other employees at Employer's place of business who had to have such experience before being hired; and document that everyone for this position was required to have nine years experience. (AF 33).

Employer submitted timely rebuttal dated August 21, 1996 (AF 36-61), following the CO's grant of an extension. (AF 58). Employer stated that it did primarily inland delivery and needed employees who were fluent to handle the "plethora of inland transportation, customs and organization problems." (AF 61). Employer stated that it required each employee to speak at least one foreign language and that it employed 23 multilingual employees. (AF 61). Employer argued that its current volume of business in Poland was too high for its current representative and that it planned to also expand into Hungary as that was the most attractive market in Central Europe. (AF 59-60). To buttress its argument, Employer stated that its total annual business volume was eight million dollars and that Poland represented \$50,000 per month (\$600,000 per year). (AF 60-61). Employer also included a bill of lading from a Polish airline, faxes from a Polish company (without translations), and some shipping manifests showing the origins in the U.S. and the destinations as various cities throughout Poland. (AF 41-50).

The CO issued her Final Determination dated September 16, 1996. (AF 62-66). The CO denied certification because she determined that Employer's rebuttal did not contain any persuasive evidence establishing a business necessity for either the foreign language or the nine year experience requirement. (AF 63). Employer requested reconsideration of the CO's determination on October 24, 1996. (AF 67-77). The CO denied reconsideration on the ground that no issues were raised that could not have been raised in the rebuttal. (AF 78). The file was forwarded to this Board. Included in the file is an appeal on behalf of Employer.

### **DISCUSSION**

We note here that any evidence submitted in the appeal that was not included in the record

on which the denial was based will not be considered. *O'Malley Glass & Millwork Co.*, 88-INA-49 (Mar. 13, 1989). Also, statements in the appeal by the attorney are considered arguments only and not evidence unless they are supported by underlying statements by a party with firsthand knowledge of the facts. *Moda Linea, Inc.*, 90-INA-424 (Dec. 11, 1991).

Section 656.21(b)(2)(i) provides that an employer shall document a business necessity for any job requirements that include a foreign language. The business necessity standard requires (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *See Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The business necessity standard of *Information Industries* is applicable to a foreign language requirement. *See Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*). Further, the business necessity test applies to foreign language requirements where the employer contends that the language requirement is justified by expansion into a foreign market. *See Trim Aire Aviation, Inc.*, 95-INA-396 (Dec. 4, 1996).

The business necessity test cannot be met through the unsupported assertions of the employer. *Lamplighter Travel Tours*, 90-INA-64 (Sept. 10, 1991). In *Lamplighter Travel*, the employer did not provide the documentation requested in the NOF. *Id.* The employer instead sent only a letter stating that the ability to speak Chinese would be very helpful. *Id.* Employer's rebuttal in this matter consisted primarily of a letter asserting its need for a Polish/Hungarian speaking freight traffic consultant. (AF 59-61). Although Employer here offered a more compelling basis for its requirement that the employee be fluent in Polish, it offered nothing beyond the letter except some untranslated correspondence and a price list. (AF 41-58).

Business necessity cannot be established through documentation which is not translated. *English Language Enterprises*, 88-INA-295 (Nov. 28, 1989). Employer submitted, in rebuttal to the CO's NOF, a letter describing the requirement that it needed an employee who spoke Polish, and buttressed that argument with faxes from a Polish company that were written in Polish. (AF 46-49, 61). These do not suffice as evidence that Polish is required for conducting business because there is no way to gauge their credibility. As Employer failed to provide documentation requested by the CO to rebut her finding in the NOF, and because we have found the documentation in Polish to be insufficient, the only potentially probative evidence remaining to support Employer's claim is the letter detailing the need for a Polish/Hungarian speaking freight traffic consultant.

Employer statements that are reasonably specific and indicate their sources and bases must be accorded requisite probative weight. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). In cases where the Board has found for the employer on the rationale of *Gencorp*, it found that either the employer's statements were so specific and detailed as to establish credibility, *see Arco Oil & Gas Co.*, 89-INA-295 (May 22, 1991); or that the subject was one which required a high degree of deference to the employer's judgment, *see Highland Hospital of Rochester*, 88-INA-564, 569 (Nov. 11, 1989). Although Employer herein cites both of those cases in support of its position, neither is apposite.

The employer in *Arco Oil & Gas* submitted three separate affidavits explaining the specific educational and experience requirements for a developmental geologist. 89-INA-295. Indeed, in that matter, the employer buttressed its own statements by referencing professional organization standards that were similar to its own, as well as articles in industry journals that described the duties of the position in accordance with Arco's requirements. *Id.* In *Highland Hospital*, the Board reasoned that because the position of physician dealt with "relief of human suffering and preservation of human life" then the employer's judgment must be accorded "particular respect." 88-INA-564, 569. Employer's letter herein contained nowhere near the detail of the three statements provided by the employer in *Arco Oil & Gas*. (AF 59-61). Further, the judgment exercised by Employer was based solely on economic considerations, not "preservation of human life." Therefore, its statements cannot be afforded the probative weight of those in *Arco Oil & Gas* and *Highland Hospital*.

It is proper for the CO to deny certification where an employer provides undocumented assertions in response to the CO's request for reasonably obtainable documentation as evidence of a foreign language business necessity. *Bewise Ranch*, 93-INA-553, 566 (Sep. 27, 1994). Employer herein states that Polish is necessary to "deal with all [of] the communication issues of the inland delivery." (AF 61). It also asserts that "the communication is almost exclusively done in Polish." (AF 60). Nowhere does Employer offer details of these "communication issues" or even supply something as simple as phone records to buttress its assertion that the freight consultant would have to be communicating with distributors throughout Poland on a regular basis. Comparing the rigorous standard set by the Board in *Arco Oil & Gas* and *Highland Hospital* for accepting employer statements as probative evidence of a business necessity, with the paucity of information supplied by Employer in this matter, we find that Employer did not carry its burden on the issue of Polish fluency as a business necessity.

Because of the potential for abuse, the full Board applied strict scrutiny to documentation presented in a matter involving a foreign language requirement that was purportedly based on proposed plans for expansion into a foreign market. *Remington Products, Inc.*, 89-INA-173 (Jan. 9, 1991) (*en banc*). In *Remington Products*, the employer established business necessity for a foreign language requirement by documenting that approximately forty percent of the people in the expansion area did not speak English, and that advertisements would be in the native language. *Id.* The documentation included a number of internal and external documents, price lists, and foreign language advertisements. *Id.* In another matter, a panel of the Board found that the employer established business necessity based on expansion for a foreign language requirement. *Azumano Travel Service, Inc.*, 90-INA-215 (Sept. 4, 1991). The employer's rebuttal included extensive telephone records, correspondence, invoices, reports and memos in English and Japanese; a breakdown of passenger bookings to Japan with specific information of airlines, dates, destinations, etc.; a letter from the employer's president; and a list of the employer's major Japanese-speaking clients. *Id.*

On the other hand, the Board did not find the existence of a business necessity in a different matter where the employer's business expansion plans lacked specificity and contained vague description of duties. *Advanced Digital Corporation*, 90-INA-137 (May 21, 1991). Employer's requirement here, that the applicant also speak Hungarian because of a planned expansion into Hungary, is analogous to the unpersuasive arguments asserted by the employer in

*Advanced Digital*. Employer provides none of the documentation found in either *Remington Products* or *Azumano Travel*. It simply asserted that Hungary had the “highest percentage of US direct investment” and that it was one of Employer’s “most promising new territories in [that] part of Europe.” (AF 59). A bare assertion such as that does not approach the level of evidence required by the Board’s precedents, and we find that Employer has failed to meet its burden on the issue of Hungarian fluency as a business necessity.

Because we find that the CO properly denied certification for failure to establish business necessity of the foreign language requirement, we need not address the other issues. Accordingly, the following order shall enter.

**ORDER**

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

**SO ORDERED.**

Entered at the direction of the Panel:

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TODD R. SMYTH  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.